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WHAT'S THE POINT? JUDICIAL OBJECTIVES IN SENTENCING

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I. INTRODUCTION

The determination of 'what is' and 'what is not' an effective sanction is a difficult and rather subjective question. A question significantly complicated by the often unclear and conflicting objectives pursued by the judiciary during the performance of their sentencing function.

This report, will briefly outline current judicial objectives, in order that the effectiveness of a particular legal sanction might more easily be determined by an understanding of its intended purpose. In addition, the report examines two very divergent attitudes prevelant within the judiciary, and concludes with a discussion on the responsibility for post-sentence effectiveness.

II. GOALS AND OBJECTIVES

THE PRIMARY PURPOSE

A review of the case law and literature suggests that the underlying judicial aim at sentencing is the protection of the public. Whether the sanction has as its specific function retribution, isolation, deterrence or reformation it is apparent that these are all 'means' used to successfully accomplish this primary objective.

In R. v. Cuthbert (1967) the Court of Criminal Appeal for New South Wales, described the purpose of punishment as follows:

> The function of the criminal law and the purpose of punishment cannot be found in any single explanation, for it (sic) depends upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime...[1]

Canadian courts have frequently emphasized the importance of this principle. For instance, MacDonald, J.A. in R. v. Wilson (1974: 646) remarked:

> ... the object of all our penal laws must surely be the preservation and promotion of the common good of our society...

More specifically, McKinnon, C.J.N.S. addressed this point in R. v. Grady (1971) stating:

> It has been the practice of this court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be attained by (a) deterrence or (b) reformation and rehabilitation.

In R. v. Fairn (1973) O'Hearn, J. summarized what he considered the recognized aim of sentencing:

> His Lordship's mention of "the public interest" takes for granted that the purpose of the Legislature in enacting criminal law and sanctions is to further the public interest...protection of the public is not a phrase picked out of the air, but that it is our constitutional circumstances, an immediate corollary of the obvious primary purpose of criminal sanctions i.e., the prevention of crime.

More recent Canadian cases have continued to emphasize this objective. In Regina v. Wood (1975) McDermid, J.A. noted the need to place "varying weights" on deterrence, reformation and retribution, in order to arrive at a sentence that could best protect society.

In what has been described as the "classic case on sentencing" (Manning, 1980:285) McLennan, J.A. in R. v. Wilmott (1967) gave prominence to this objective:

> The fundamental purpose of any sentence of whatever kind is the protection of society. That this is the real purpose of a sentence cannot be over-emphasized.

Based on the case law it is apparent that "the judges mission in sentencing is to protect society" (Manning, 1980: 287), by means of rehabilitation, retribution, deterrence, incapacitation, or more likely, a combination of two or more of these goals. Culliton (1980) in an effort to emphasize this point stated that a judge "... must not lose sight of the fact that the whole criminal process is for the protection of the public and that the criminal law must be administered and enforced to attain that purpose" (at 301).

In 1969, the Canadian Committee on Corrections affirmed this conclusion (at 194):

> The primary purpose of sentencing is the protection of society. Deterrence, both general and particular, through knowledge of penalties consequent upon prohibited acts; rehabilitaion of the individual offender into a law abiding citizen; confinement of the dangerous offenders as long as he is dangerous, are major means of accomplishing this purpose...

A more in-depth examination of each of the subordinate goals; retribution, deterrence, rehabilitation, and incapacitation follows.

RETRIBUTION

Since the writings of Cesare Beccaria (translated, 1968) and the development of the 'classical school' of criminology, retribution has played an important and consistent role in the sentencing of offenders. It was espoused that if laws were known to all, with punishment which only slightly outweighed the advantages to be gained from criminal behaviour, then crime would be significatly reduced. Rationality, certainty of punishment, and the notion of lex talionis are all principles of this retributive model. Cross (1975), described the retributive theory in these terms (at 114):

> Vindication in the sense of society's claim to amends for the harm done, or for the outraged feelings, fairness to the law abiding and proportionality of punishment to the seriousness of the offence may respectively be treated as the bases of retributive theories.

The retributionist approach, lost much of its appeal during the 18th century largely due to the development of modern psychology, a growing humanitarianism, and ultimately by the acceptance of the 'positive school' or treatment approach to criminology. Despite these developments, retribution as an acceptable objective in sentencing has a number of proponents today; including Van den Haag (1975), Singer (1979), Wilson (1975), and others.

During the mid-1970's sentencing reform has been characterized by a move towards a determinate or presumptive form of sentencing law; in essence a return to retribution. The change resulted from a variety of influences on the system, the most significant of which were--the revelation that rehabilitation was an unattainable goal, and the unfairness relative to disparity in sanctions caused by the indeterminate sentence (American Friends Service Committee, AFSC, 1971: Martinson, 1974: Krup, 1981, and Morgan, 1979).

Proponents of the retributive approach saw swift and certain punishment for the guilty, punishment that is fair but firm, and the end of unequal sentencing of persons who have committed crime as a method to ensure a just system of punishment (Fogel, 1975). Moreover, others such as Morgan (1979), argue that a return to retribution will end the rehabilitation rhetoric thereby permitting the use of the more accurate and honest word "punishment", when describing what is done to offenders.

In 1974, the Law Reform Commission of Canada advocated a return to punishment based on retributive theory, stating (at 201):

> The specific proposal of "retribution" is that punishment should be distributed to those who deserve it. The conclusion is demanded by principles of fairness: these in turn are founded on the value of equality in the relationship of persons within a society. Accordingly, the retributive argument is a relatively concrete implication within the criminal law of a general theory of justice and social policy.

Denunciation, has been described as "a close cousin to retribution" (Manning, 1980: 274), providing a warning to others while simultaneously offering public disapproval. McDermid, J.A. in Wood (1975) agreeing with the decision of R. V. Hinch and Salanski (1975) related retribution to the notion of social denunciation and reprobation:

> The denunciatory sentence plays an important part in maintaining the righteousness of society values. The community demands that certain conduct be heavily punished and when the courts fail to satisfy this demand to support core values, the public, in my view, can justifiably complain that the courts have failed in their duty.

The distinction between vengeance and retribution is less than clear and has been an important concern of appellate review. The British Columbia Court of Appeal in R. v. Hinch and Salanski (1975) concluded that vengeance has no role in the determination of an appropriate sanction. However, despite this pronunciation, the Law Reform Commission of Canada (1974) noted a prevelant comment in the literature that suggests that the retributive theory is merely "an intellectual rationalization of an emotional fixation (at 202; see also Manning, 1980: 174). What is clear, is that vengeance is an unpopular criteria for sentencing, however, the degree to which it actually affects sentencing outcomes remains unsubstantiated.

DETERRENCE

Another close relative of retribution, the deterrence theory, "is that those who have not transgressed will be warned against crime when they see punishment imposed on others, and the offender who is convicted and punished will be dissuaded from repetition" (McKay, 1976: 225). Deterrence however, is attacked by its skeptics as an unattainable objective in light of the increasing number of first-time offenders and the large number of repeat offenders who populate custodial institutions.

Nonetheless, others have argued, and quite rightly, that studies indicating the ineffectiveness of criminal penalties as a deterrent should not be taken to mean that all sanctions are ineffectual "in deterring all types of offences" (Chambliss, 1971: 196).

The courts distinguish clearly between specific and general deterrence and the purpose of the sentence for each. In assigning a sentence based on general deterrence Culliton, C.J.S. in Morrissette (1971) suggested that factors to be considered in determining type and length of sentence, were: "gravity of the offence, the incidence of crime in the community, the harm caused by it either to the individual or to the community, and the public attitudes toward it." This concern for the community and public attitudes is necessary to meet what Shultz, J.A. described as the purpose of general deterrence in R. v. Iwaniw; R. v. Overton (1959):

> ... to demonstrate to potential offenders the consequences of committing a similar offence. In this connection, the sentence is the registration of the moral obloquy with which society regards the crime.

The need for the general deterrent function to maintain the law's credibility was stated quite simply yet succinctly by Justice Holmes and quoted by O'Hearn, J. in R. v. Fairn (1973)--"the law must keep its promise" (see also Cross: 116).

INCAPACITATION

Incapacitation has as its major purpose the removal and isolation of an offender in order to protect the general welfare of society from his or her further criminal activity.

Van Den Haag (1975), recently pointed out a major flaw regarding the usefulness of this philosophy. He noted that "crime rates cannot be reduced through imprisonment because most crime is not committed by persons with identifiable characteristics that would lead to their detention for the purpose of decreased victimization" (see Miller, 1981: 27).

Nevertheless, incapacitation as a useful method of meeting the primary objective of sentencing was observed by McLenan, J.A. in R. v. Wilmott (1967):

> Where the sentence is one of imprisonment the protection of society is accomplished in an absolute sense by preventing the offender from repeating his unlawful acts during the term of his imprisonment.

REHABILITATION

From the positivist school, came the philosophy that the causes of crime were conditions which could be changed. It followed that the most appropriate strategy should be treatment or reform of the offender. As such, sanctions based on this philosophy placed an emphasis on the characteristics of the individual offender. For example, the young offender with no prior record is considered particularly appropriate for "individualized measures" (Thomas, 1979: 8).

As a necessary corollary of the therapeutic model, came the development of the indeterminate sentence. Ferri (1919), discussed the need for such a relationship (at xlii):

> The seclusion of dangerous criminals for an indeterminate time is a proposal of the positivist criminal school, since it would be as absurd to say that a murderer should remain in prison twenty years rather than fifteen or thirty as it would to say in advance that a sick person should stay in a hospital ten days rather than twenty or fifty.

The 'optimism' of the individualized sanction aimed at the reformation of the offender ended in the mid-1970's as sentencing entered what Mueller (1980) called the period of "nihilism" (at 13). Evaluative studies such as Lipton, Martinson, and Wilks, 1975 synthesis of over two-hundred treatment programs, and Martinson's "nothing works" conclusion caused many to see rehabilitation as unattainable.[2] This revelation, coupled with widespread disparity in sentences resulted in a change to determinate sentencing in many U.S. states. In Canada, the move to determinate sentencing legislation is not without its proponents, and as alluded to earlier, was advocated by the Law Reform Commission in 1974.

Despite this rather widespread rejection, Canadian appellate courts have generally continued to accept the notion of rehabilitation as enunciated by McKay, J.A. in R. v. Willaert (1953):

> The tendency in recent years has been to impose more moderate sentences. At one time it was commonly assumed that the only purpose of punishment was to punish, but today its function is conceived in very different terms. It may be to try to reclaim the offender for society, to induce and stimulate habits of regularity and reliability even to compensate partially for an education that ended prematurely, and generally to try to awaken in the mind of the vicious and irresponsible a sense of the obligations of life and citizenship. Such moderation in sentence may not

> by warranted in the case of confirmed criminals but in that of the first offender an effort at reclamation is surely the part of wisdom and prudence in judicial discretion.

In R. v. Wallace (1973), Brooke, J.A. affirmed protection of the public as the primary objective of criminal law, and concluded that the best future protection for society was the imposition of a sentence that will rehabilitate the offender.

It should be noted that in R. v. Holden (1962), Davey, J.A. noted that it was not appropriate to sentence an offender to a heavier sentence than the "nature of the offence requires." He went on to add:

> Heavier sentences must not be imposed for collateral purposes in the professed interests of society or of the prisoner, either to extend the minimum time the prisoner must serve before obtaining parole, or to keep him to custody until the parole board decides he may properly be released.

SYMBOLISM: Another Objective

To leave a discussion of the aims of sentencing at this point would be to ignore and belittle another important purpose which is performed by the 'solemn' and symbolic nature of the proceedings. For instance, "the determination of application of a sanction serves as a teacher of minimal standards of morality and behaviour; as an agency for the expression of public indignation and condemnation; and as a force operating to produce cohesion within society" (Gibney, 1978: 19).

Although it may be argued, that the symbolic nature of sentencing is an aspect of each of the goals already acknowledged, and that it is not a formal purpose of sentencing, it must be

emphasized as a seperate and distinct function. The importance of this publicly symbolic display, has been summarized by the Law Reform Commission of Canada in the following manner (1974: 44):

> Courts are a forum in which symbolic struggles take place in a highly ritualized and dramatic form. Such rituals may have little concrete value in terms of actually bringing the problem concerned under control but they have high symbolic value which cannot be ignored. The public wish to participate in the dialectic between good and evil, challenge and response, fear and reassurance and to feel a catharsis at the end of such struggles. The public need to feel reassured that "justice" triumphs.

Of special interest, is Wilkin's (1975) suggestion that there is a lack of honesty prevalent in the language of the criminal justice system, particularly as it relates to the belief "that our actions are rational when they are mainly symbolic" (at 81). He argues that by acknowledging the symbolism inherent within the system, we will be better equipped to begin to understand its importance and discover its considerable value.

III. JUDICIAL ATTITUDES AND THE BLENDING IMPERATIVE

There appear to be "two main judicial attitudes" (Gibney, 1978: 20) or philosophies based on different objectives and principles operative in the determination of a sanction (Thomas, 1979). The judiciary has the choice of imposing a sentence based on the offenders culpability, referred to as the tariff system, or he may endeavor to modify future behavior by emphasizing the individualized approach. The tariff disposition requires that the sentencer reflect on the offender's culpability and the gravity of the offence. While the individualized measure requires an examination of the offender's characteristics in order to determine his or her "likely response to various penal measures" (Thomas, 1979: 19).

Palys (1980), recently observed this "philosophical disparity" during a simulated study of judicial decision-making. He noted that judicial dispositions are based on their 'predisposed orientation' to either rehabilitation or a "more punitive orientation focussed on general deterrence and protection of the public" (at 5).

The sentence given to any offender is quite obviously not limited to any one of the goals discussed, but instead is frequently arrived at by a 'blending' of two or more. This blending of goals, is frequently required if a sentencer is to arrive at a fit, reasonable, and acceptable sanction.[3]

VI. POST-SANCTION EFFECTIVENESS -- WHO IS RESPONSIBLE?

In Canada, the responsibility for the effectiveness of dispositions appears to have been seen by many within the judiciary as a problem for the post-sentence components of the Criminal Justice System. Probation, parole, and specifically correctional agencies are seen as the appropriate bodies to deal in an effective manner with the goals expressed at the time of sentencing.

Manning (1980) has argued, that after the location, duration, and degree of penalty has been determined, it is "no longer the judge's responsibility" (at 228). The conditions of probation he suggests, are for the most part the domain of social workers, psychologists and other specialists -- "the judge merely names the forum" (at 287).

Agreement with this view, as it relates to the successfulness of rehabilitation within institutions, was addressed directly by Allen, J.A. in R. v. Mellstrom (1975):

> Granted there has been much criticism of our penal institutions and the adequacy of the treatment of offenders to achieve some of the objectives outlined

> above, but these are considerations which the Courts, by themselves, cannot remedy, and until those changes and reforms which may be necessary are effected by the authorities controlling these institutions we must work with the "tools available" to us, and our prime consideration must be as to whether sentences which come before us for review are appropriate to accomplish, in some degree at least, within the principles above outlined, the purposes which they are intended to serve, and in my view the protection of society from the repetition of such crimes against it is one of the most important of these purposes (emphasis added).

That philosophy of non-intervention and lack of concern for the problems of correctional institutions was affirmed recently in the Quebec Court of Appeal. In increasing the length of a prison sentence, the Appeal Court noted that prison overcrowding was not an appropriate consideration for use in deterring a sentence. The Court concluded that the problems of correctional administrators should not deter courts from imposing the appropriate sanction.[4]

Nevertheless, it would be erroneous to suggest that the judiciary cannot and does not consider itself responsible for some degree of sentence effectiveness. Who else could be held responsible for the effective denunciation of criminal behaviour? And, who but the judiciary can apply a particularly deterrable sentence? This question becomes even more complicated when one considers the effect which parole board decisions may have on what was originally considered an effective sanction. Quite clearly, sentences imposed with an emphasis on rehabilitation are considered someone else's responsibility,[5] however, the responsibility for the success of a sanction based on other goals is nowhere near as clear-cut.

Recent years, have witnessed growing criticism directed at judicial failure to apprise itself of correctional capabilities and conditions. The same complaint has been made by heads of community agencies to which the judiciary refers offenders for treatment (Reichert, Jr., 1975: 131).[6]

Moreover, the judiciary itself admits that (Renfrew, 1977: 590):

> ... one of the burdens of sentencing responsibility is that the judge never knows whether the purposes of his sentences are appropriate, let alone whether the purposes will be achieved.

In the United States, the immunity from judicial review held by correctional agencies has dissipated drastically in the last few years. The American judiciary has not been content to resolve minor "conflicts, but have made Herculean efforts, by use of structural injunctions, special masters, and citizen visiting committees, to restructure and reorganize prisons according to their own value preferences" (Jacobs, 1980: 430). Not surprisingly, this judicial interference is condemned by prison officials who contend that "their capacity to administer their institutions and to maintain basic order and discipline has been circumvented" (at 430).[7]

V. CONCLUSION

I have attempted in this report to give a brief overview of the important judicial objectives in sentencing. I had also endeavoured to determine who within the Criminal Justice System is responsible for sanction effectiveness. From that discussion, it should be apparent that it is an area requiring further review and analysis. I hope that this material will, to some degree, prove useful in identifying appropriate areas for research by the National Study of Sentence Effectiveness and Adult Court Process.

NOTES

1 Many of the cases cited have been obtained from - Sentencing Handbook - Principles and Powers.

2 Both of these studies have their skeptics; Cousineau and Plecas (1982) argue that these studies are of very poor quality and have been "sanctified" as excellent and superior research by criminologists.

3 See R. v. Deschenes (1963); R. v. Simons et al (1973); R. v. Morrissette. (1971).

4 This is the case of Emile Asselin, involving a matter of municipal coruption. The case is reported in the Bulletin of the Canadian Association for the Prevention of Crime, May 1982. A case citation was unavailable.

5 A policy that is consistent with the theory of rehabilitation.

6 Although, the case of Emile Arselin would suggest that such criticism has had little appreciable effect.

7 See Bell v. Wolfish (1979); and also Rubin, Sol. The impact of court decisions in the correctional process, Crime and Delinquency, 1974, 20, 129-39.

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